NO. 20-_____

In the Supreme Court of the United States

JOHN J. MASIZ,

Applicant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondents.

On Application for a Stay of the Judgment of the District Court for the District of Massachusetts CA No. 12-12324-MLW

APPLICATION FOR STAY TO JUSTICE BREYER

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APPLICATION TO INDIVIDUAL JUSTICE

To Justice Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the 1st Circuit:

I. BACKGROUND REGARDING APPLICATION

Pursuant to U.S. Sup. Ct. Rule 22 and 28 U.S.C. § 2101(f), Applicant John J. Masiz (Masiz)*[1], applies for a stay from the Single Justice. The application for a stay is to enable Masiz a reasonable period of time to file a petition for a Writ of Prohibition directed against the district court or, in the alternative, a Writ of *Certiorari* regarding the 1st Circuit's September 11, 2020 peremptory denial of relief in appeals #19-2206, #20-1177, and #20-1729.

Application Is Needed to Prevent Imminent Harm to Fundamental Rights

The Application concerns the district court's decision in *SEC v. BioChemics, et al*, 435 F. Supp. 3d 281 (2020) ("*BioChemics'* decision") that holds, contrary to the foundational principles of the Constitution and Supreme Court precedent, that the federal court, in the absence of a case or controversy, has the "inherent authority" to initiate and conduct its own "public" investigation of whether a party, who the SEC

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* All references in this Application are to the pages of the Appendix accompanying this filing denoted as "[#]a"

[1] Masiz was the Petitioner seeking a Writ of Prohibition directed against the district court, in *In Re Masiz*, Petitioner 1st Circuit Appeal #20-1729, and was the Defendant-Appellant in *SEC v. BioChemics, Inc. et al*, 435 F. Supp. 3d 281 (2020) ("*BioChemics*' decision"), 1st Circuit Appeal #20-1926 and #20-1177. The *BioChemics'* decision is at 61a-91a.

has *found to be in compliance*, has, in fact, complied with an SEC obtained consent decree.[2] As detailed below, relief from a Single Justice is urgently needed because the federal court's claimed authority to subject Masiz to coercive inquisitorial power in the absence of a case or controversy between the parties to the consent decree, is *presently being used* against Masiz so that he cannot freely participate in the marketplace, or participate, on the same terms as other bidders, in the September 22, 2020 receivership auction of BioChemics' intellectual property. The specific relief requested from the Single Justice is at **Section II** below.

Masiz Wishes to Freely Participate in the Martketplace and Auction

Masiz is the founder and major shareholder, as well as a former officer and director, of BioChemics, Inc. (BioChemics) which went into receivership in 2018 at the same time that BioChemics' former subsidiary Inpellis, Inc. (Inpellis) went into bankruptcy.[3] Masiz wishes to freely participate in the marketplace without being subjected to the district court's unconstitutional assertion of its coercive inquisitorial power.[4] In addition, Masiz wishes to freely participate, on the same terms as any other bidder, in the intended joint sale by auction of the intellectual property assets of BioChemics and Inpellis by the Receiver and Bankruptcy

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2 *See*, *BioChemics*' decision at 78a-82a; Compare with SEC's 9-19-19 Report at 221a-223a, and **Section VA(1)-(5)** below.

3 141a;151a; 63a.

4 216a-217a.

Trustee.[5] The auction is now scheduled for *September 22, 2020*, and the deadline for interested bidders to register for the auction is *September 15, 2020*.[6]

The *BioChemic's* Decision Abrogates Masiz's Rights

Unfortunately, Masiz's claimed right to freely participate in the marketplace without undue governmental interference, and to participate in the auction, on terms applicable to every other bidder, has been abrogated by the lower court's assertion that, for the reasons detailed in its reported *BioChemics'* s decision it has the "inherent authority," *sua sponte*, to investigate Masiz's compliance with two consent decrees obtained by the SEC in 2004[7] and 2017[8].[9] The lower court has taken this position in the absence of any allegation by the SEC that Masiz has violated any of the consent decrees' terms.[10] On the contrary, the SEC, has, in fact, determined, by a report dated September 19, 2020,[11] subsequent to a court ordered review,[12] that Masiz had complied with the 2017 decree's requirement that Masiz provide potential investors with an agreed upon regulatory history disclosure.[13] The

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5 195a; 124a.

6 35a-36a.

7 63a.

8 105a.

9 171a-172a; 176a-177a; 199a; 201a; 202a-203a; 204a-205a; 205a.

10 213a; 196a; 199a; 202a.

11 221a.

12 104a.

13 223a.

disclosure requirement was imposed, pursuant to 15 U.S.C. § 78u(d)(5), as a non-punitive equitable remedy, that the parties intended *not* "unduly interfere with Masiz's ability to work."[14]

Masiz Has Challenged Court's Claimed "Inherent Authority"

Masiz has since November, 2019 challenged the court's assertion of "inherent authority" in his two appeals and petition for writ of prohibition to the 1st Circuit.[15] In addition, on September 2, 2020, Masiz filed a motion to stay the scheduled September 22, 2020 "sale" pending resolution of the matters then before the appellate court. On September 11, 2020, a three judge panel of the 1st Circuit peremptorily: "denied" the petition, and "denied" the two appeals and the stay motion, as "moot".[16]

1st Cir. Denial of Relief Leaves BioChemics' Decision as Law

By its summary denial, the 1st Circuit has left standing the district court's *BioChemics'* decision declaring it had the "inherent authority" to investigate, *sua sponte*, Masiz's consent decree compliance, and left unaddressed, the continuing substantial injury it is causing to Masiz's fundamental rights of citizenship.[17] Beginning in November, 2019, the federal court threatened Masiz with civil or criminal contempt if he did not file in the "public record" the extensive and sensitive

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14 228a.

15 212a-217a; 195a.

16 2a.

17 216a-217a; 171a-172a; 176a-177a; 199a; 201a; 202a-203a; 204a-205a; 205a.

compliance information Masiz submitted to the SEC for their review.[18] When the 1st Circuit denied Masiz his request for a stay pursuant to FRAP Rule 8(a), Masiz was compelled by the terms of the *BioChemics'* decision to publicly file, under compulsion, the compliance documents on January 30, 2020.[19] The district court itself found in its *BioChemics'* decision that its order forcing Masiz to "publicly" file the sensitive business information regarding his compliance would cause Masiz "harm" that is "irreversible."[20] The court was given notice that its public inquisition had made Masiz a "pariah" in the marketplace.[21] Despite this, the district court continues to subject Masiz to coercive inquisitorial power and threatens to expand the scope if Masiz participates in the BioChemics' auction.[22] Although the court has had the compliance information submitted to the SEC for the past six months, the court has indicated its investigation regarding Masiz's compliance with the 2017 disclosure requirement, has not closed, but is continuing. At the July 10, 2020 sale approval hearing when pressed, all the court would say is: " . . . I've got [the compliance documents], and *so far* . . . I haven't said that there's a failure of compliance."[23] The district court made it clear at that sale approval hearing that, it "doesn't always agree with the SEC" and, as indicated in its *BioChemics'* decision, it

18 92a-102a.

19 199a-200a.

20 89a.

21 216a-217a.

22 171a-172a; 176a-177a; 199a; 201a; 202a-203a; 204a-205a; 205a.

23 200a (emphasis added).

believed as a result of Inpellis creditor ADEC's accusations, that the "SEC was complicit" "in taking" a senior priority lien granted as a result of a court approved 2016 settlement, and it was "not relying exclusively on the SEC's judgment."[24] The court repeatedly stated at the hearing that if Masiz participates in the upcoming September 22, 2020 auction, it will use the authority it claims it has under the *BioChemics'* decision to investigate not only Masiz's compliance with the 2017 decree's disclosure requirement but also, whether Masiz complied with the injunction in the 2017 and 2004 consent decrees against violating the securities laws.[25] The district court also made it clear at the 8-27-20 evidentiary hearing that any such investigation will require Masiz to produce the "evidence of [his] compliance and do that on the public record."[26]

Masiz's Objection to Sale Demonstrates Decision's False Factual Premise

Subsequent to the July 10, 2020 sale approval hearing, Masiz filed an Objection to the sale going forward without his being assured of his right to freely participate in the bidding process on the same terms applicable to every other bidder.[27] Masiz filed an extensive Affidavit and evidence demonstrating that the reasons given by the district court in the *BioChemics'* decision for exercising its purported "inherent

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24 202a-203a.

25 171a-172a; 176a-177a; 199a; 201a; 202a-203a; 204a-205a; 205a

26 12a.

27 8a; 16a-17a.

authority," were without factual justification.[28] The purported basis for the district court ruling in its *BioChemics'* decision that it had "inherent" investigatory power over Masiz, centered around the court's belief that Masiz "*may*" have or "*might*" be violating the 2017 consent decree because the district court believed that it could not trust the SEC or Masiz in view of Masiz's regulatory history and the accusation by Inpellis creditor ADEC, that the SEC and Masiz had supposedly "colluded" in a 2016 court approved settlement that granted the SEC a senior priority lien in BioChemics and Inpellis intellectual property.[29]

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[28] 9a-10a;12a; 18a; 72a; 79a-80a; 82a; 202a-204a:There were three factual assertions cited by the district court that caused it not to trust the SEC and to suspect Masiz "may" have or "might" be violating the consent decree: 1) the assertion that the SEC had "seven" out of eighty unaddressed "concerns" regarding Masiz's compliance (73a-74a), when it identified only a "single instance" (223a) that was subsequently shown by Masiz to have been properly addressed (218a-219a); 2) the district court had "found" Masiz violated the 2004 consent decree (79a; 12a), when no such finding had ever been made (107a-108a); and, 3) non-party ADEC's accusation that the SEC and Masiz had "colluded" in the 2016 court approved settlement that granted the SEC a senior priority lien in the BioChemics and Inpellis intellectual property assets (79a;80a;82a;202a-203a), when the record, known to all the respondent in this matter, removes all doubt that the settlement provided substantial consideration to Inpellis, including ending the existential threat of an ongoing SEC investigation concerning Inpellis' IPO registration statements and that the strategy to pursue the "global resolution" of the protracted dispute was enthusiastically endorsed by Inpellis' CEO and its highly experienced specially retained outside counsel (18a).

[29] 72a; 79a-80a; 82a; 202a-204a.

District Court's Decision Based on Material Mis-Statement

The district court's *BioChemics'* decision also relied on the court's misrepresentation of what the SEC had found in its report about Masiz's compliance. The district court in its decision mis-quoted the SEC's report resulting in the suggestion that the SEC had unaddressed "concerns" about "seven instances" out of eighty solicitations by Masiz that the required disclosure was "buried" in a due diligence dropbox link.[30] Based on this untrue assertion, the lower court ruled it was necessary to compel Masiz to publicly file his compliance documentation because, according to the court, "there is reason to be concerned that at least some potential investors did not receive, in proper form, the information Masiz was required to disclose."[31] The court believed, a "[p]ublic filing may rectify that problem and give any actual investors, particularly, information that may be material concerning how they wish to proceed."[32] The court concluded that "If, as Masiz suggests, the information in the public filings causes others to be wary of doing business with Masiz, the judgment will have served its intended purpose . . . ".[33] The court's material mis-statement about the supposed existence of "seven instances" of potential investors who were supposedly not properly provided the required disclosure was rendered that much more problematic by the district

30 73a-74a.

31 84a.

32 *Id.*

33 *Id.*

court completely omitting the SEC's finding that Masiz had complied with the disclosure requirement.[34] In fact, the SEC determined that there was only "one instance" out of eighty where the SEC was concerned that a potential investor was not directed to the disclosure as the other investors had been but only received the dropbox link to due diligence material that contained the disclosure[35]—a concern that Masiz quickly addressed by submitting the documentation demonstrating that that investor was directed to the disclosure in the same manner as the others that the SEC had determined was sufficient.[36]

Masiz Barred from Participating at Evidentiary Hearing

Despite Masiz's numerous attempts to have the district court acknowledge and correct its material mis-statement regarding the SEC's compliance finding as well as acknowledge the lack of factual justification regarding the two other asserted reasons at the core of its decision,[37] described above, the court has exhibited complete indifference to the factual underpinnings of its ruling that it has the "inherent authority" to investigate Masiz irrespective of what the SEC has determined.[38] At the August 27, 2020 joint "evidentiary hearing" held by the district and bankruptcy courts regarding the Receiver and the Bankruptcy Trustee's motions to approve the sale and related motions, and the Objections filed by Masiz

34 73a-74a.

35 223a.

36 218a-219a.

37 28a; 203a-204a.

38 202a-205a; 17a-20a.

and a BioChemics' creditor BioStrategies, both court's allowed BioStrategies the opportunity to conduct an extensive examination of the Trustee and Receiver.[39] However, unlike the latitude granted BioStrategies, and contrary to the plain words of the courts' 8-20-20 Joint Order scheduling the evidentiary hearing that directed "any party" "will have such an opportunity",[40] both court's barred Masiz from conducting any examination or presenting any evidence in support of his Objection.[41] The district court ruled that any such examination or evidence was in the words of the district court, "not relevant" and a "waste of time."[42] Citing its *BioChemics'* decision, the district court denied Masiz's Objection to the sale going forward without Masiz being assured that he could participate on the same terms as every other bidder and not be singled out for an investigation.[43] The two courts then closed the hearing, and issued orders approving the scheduled September 22, 2020 auction sale.[44]

***BioChemic's* Decision Violates Fundamental Precedent**

As more fully detailed in **Section V** below, the district court's: targeting of Masiz and subjecting him to an ongoing coercive "public" investigation; singling him out for special treatment, if he participates in the bidding process -treatment that is

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39 116a-117a.

40 24a.

41 116a-117a; 120a-129a; 133a-136a; 137a-139a.

42 5a; 19a.

43 4a-5a; 8a-10a; 12a-13a; 16a-17a.

44 116a-117a.

outside the terms and conditions applicable to every other bidder; and barring him from examining witnesses or presenting evidence in support of his Objection, constitutes a fundamental deprivation of Masiz's rights. The assertion of coercive investigatory power against Masiz regarding compliance with the SEC obtained consent decrees, in the absence of a case or controversy between Masiz and the SEC, violates the Article III limits on judicial adjudicatory authority laid out by this Court in *US Parole Comm., Inc. v. Geraghty*, 445 U.S. 388 (1980) and the "party presentation principle" recently re-affirmed in *US v. Sineng-Smith*, 140 S. Ct. 1575 (2020); and, the limits on federal court jurisdiction over consent decrees annunciated in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 US 375 (1994). The assertion of such inquisitorial power by a federal court over SEC obtained consent decrees unconstitutionally usurps the Article II authority of the SEC—a usurpation of a co-equal's authority famously decried in *Young v. US ex rel Vuitton Et Fils SA*, 481 US 787, 816-824 (1987) (Scalia, concurring) and an anathema to the fundamental organizing principles of our republic re-affirmed by the Justices in *Patchak v. Zinke*, 138 S. Ct. 897, 904-905 (2018). The usurpation of the SEC's authority regarding the disclosure requirement in the 2017 consent decree obtained by the SEC pursuant to its authorizing statute,15 U.S.C. § 78u(d)(5) also directly contravenes this Court's recent decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020) prohibiting the use of the equitable remedies, authorized by the statute for the protection of investors, as an "instrument of punishment" against the defendant. In addition, preventing Masiz from participating in the evidentiary

hearing, denied him his right as a citizen under the 5th Amendment not to have his liberty and property taken without substantive and procedural due process. In the face of such a bald assertion of extra-judicial power by the federal court and the failure by the 1st Circuit to exercise any oversight responsibility in the face of such an unadorned abuse of power, Masiz has only one alternative. He must petition the Supreme Court for extraordinary relief, under 28 U.S.C. § 1651, for a Writ of Prohibition directed against the district court or, in the alternative, a Writ of *Certiorari* under 28 U.S.C. § 1254(1) directed to the 1st Circuit, and seek interim relief from the Single Justice in the form of a stay of the relevant proceedings below, under 28 U.S.C. § 2101(f) and S. Ct. Rule 22.

II. RELIEF SOUGHT FROM THE SINGLE JUSTICE

Masiz seeks, on an urgent basis, from the Single Justice, an immediate stay of the enforcement of the *BioChemics'* decision generally and, in particular, regarding the intended September 22, 2020 auction of BioChemics' assets, as well as a stay of the auction now tainted by the unconstitutional *de facto* exclusion of Masiz. The stay is necessary to enable Masiz a reasonable time to obtain from this Court a Writ of Prohibition directed against the district court or, in the alternative, a Writ of *Certiorari* to the 1st Circuit, while maintaining the status quo and avoiding irreparable harm to Masiz's rights.

III. RELIEF IS NOT AVAILABLE BELOW

As detailed in **Section I** above, Masiz has vigorously sought to protect his rights and seek relief from both the lower court and the 1st Circuit. Masiz brought the

matter to the 1st Circuit's attention both by his two appeals as well as through his seeking extraordinary relief through his Petition and a request to the single judge for a stay. Masiz zealously sought relief from the district court up to and through the August 27, 2020 evidentiary hearing.[45] When the district court made its peremptory ruling denying Masiz's Objection, Masiz requested by oral motion a "stay of the sale proceedings"—an oral motion that the district court, in the words of Rule 8(a)(2)(A)(ii) "failed to afford relief."[46] Masiz then gave notice to the courts and to the parties that he intended to immediately pursue appellate relief on both constitutionally substantive (Masiz was "denied his rights to freely participate" in the sale) and procedural grounds (Masiz was denied "his due process in the proceedings itself").[47] On September 16, 2020 Masiz filed a notice of appeal regarding the district court's denial of Masiz's Objection to the sale; barring Masiz

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45 *See*, **Section I** above.

46 8-27-20 Sale Motion Evidentiary Hearing at 137a-138a. In response to Masiz's oral motion for a stay of the "proceedings about the sale," the district court stated:

> There's not—well, let's see. I don't want to get diverted on this. The standards for stay require—I addressed in my *Canterbury Liquors* case in 1998, you can look at it. If you want to file a motion for stay, you may, but at the moment I doubt it would be meritorious and—I don't think we should get diverted with that.

8-27-20 Evidentiary Hearing at 138a.

47 At the conclusion of the 8-27-20 Evidentiary Hearing, Masiz stated his intention to seek a stay in this Court:

> We will be appealing our rights . . . and asking that . . . the sale be stayed because Mr. Masiz is being . . . unconstitutionally denied his rights to freely participate and his due process rights in the proceedings itself. . . .

8-27-20 Evidentiary Hearing at 139a; *See also*, 117a.

from examining or presenting evidence at the 8-27-20 Evidentiary Hearing; and not affording the relief requested by Masiz's oral motion for a stay of the sale. With the peremptory denial by the three judge panel of Masiz's two previous appeals and stay as "moot" and the one word denial of his Petition for Prohibition,[48] there are no viable alternatives in the proceedings below to avoid imminent harm.

IV. DECISIONS THAT ARE SUBJECT OF APPLICATION

BioChemics' Decision

In the *BioChemics'* decision that is the subject of this application, the district court ruled that it had "inherent authority" to conduct an investigation, *on its own*, regarding Masiz's compliance with the SEC obtained consent decree.[49] The district court based its ruling that it possessed "inherent authority" to conduct *its own* investigation on three cases: The Supreme Court's opinion in *Peacock v. Thomas*, 516 U.S. 349, 356 (1996); and, two Second Circuit cases, *Berger v. Heckler*, 771 F. 2d 1556 (1985) and *EEOC v. Local 580 Intern. Ass'n of Bridge, Structural & Ornamental Ironworkers*, 925 F. 2d 588 (1991).[50] The three cited cases do not support the district court's proposition.

What the district court misapprehends, is that the cases it cites do not, and cannot, support the district court's legal proposition that federal courts have "inherent authority" to conduct their *own* consent decree investigations. To do so

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48 2a.

49 78a-82a.

50 *Id.*

would change judges from adjudicators to inquisitors in violation of fundamental Constitutional principles limiting the federal court's jurisdiction to "cases or controversies" between parties. Each of the cases cited by the district court make the point that federal court jurisdiction, ancillary or otherwise, is constitutionally limited to "*claims*" involving "*cases or controversies*" between parties.

In *Peacock v. Thomas*, *supra*, the Supreme Court in ruling that a federal court does not have ancillary jurisdiction over an additional action to enforce a money judgment against a new party, made it clear that ancillary jurisdiction applies only to "*claims*" that have "factual and logical dependence on the *primary lawsuit*." *Id.* at 355 (emphasis added). "The court *must have jurisdiction over a case or controversy* before it may assert *jurisdiction over ancillary claims*." *Id.* (emphasis added). "The basis of the doctrine of ancillary jurisdiction is the practical need to *protect legal rights* or effectively to *resolve an entire logically entwined lawsuit*." *Id.* (emphasis added).

The 2nd Circuit cases cited by the district court which arose out of disputes between the parties to consent decrees, also make the point that ancillary jurisdiction only applies to "*cases or controversies*" regarding the "*claims*" of the parties. Both *Berger v. Heckler*, *supra*, and *EEOC v. Local 580*, *supra* dealt with the district court's *adjudication* of contempt actions where the plaintiff parties to the consent decree claimed that the defendants were not in compliance with the decrees.

The court does not cite any other cases for its proposition because none exist. The only case that stands for the proposition that a federal court has the "inherent

authority" to police a consent decree and follow up on its suspicions through the assertion of coercive inquisitorial power, is the *BioChemics*' decision at issue in this matter.

Ruling the Factual Premise of the *Biochemics'* Decision "Not Relevant"

The district court barred Masiz from participating in the 8-27-20 evidentiary hearing based on its ruling that the evidence regarding the veracity of the factual assertions cited by the district court in its *BioChemic's* decision were "*not relevant*" to Masiz's Objection or the evidentiary proceedings.[51] The district court held this position despite the fact that the 8-20-20 Joint Order scheduling the evidentiary hearing specifically stated that "[a]ny party wishing to cross-examine the Trustee or the Receiver with respect to the Affidavit[ ]" testimony they were ordered to submit and testify to "will have an opportunity to do so at the Sale and Settlement Approval Hearing" and that "[i]f any objecting or responding party seeks to designate witnesses or identify exhibits with respect to their Objections or Responses, they shall do so, and provide copies" to opposing counsel.[52] The Receiver and Trustees' testimony directly dealt with the ADEC accusation that was core to the *BioChemics'* decision and Masiz's Objection specifically objected to the district court's using the factual assertions in its *BioChemics'* decision as the reason why it needed to single

51 5a; 19a.

52 24a-25a.

Masiz out for investigation regarding his consent decree compliance.[53] Against such a record, the district court's ruling that the evidentiary basis of the Objection was "not relevant" to the proceedings makes no sense. On September 16, 2020 Masiz filed a notice of appeal regarding this ruling.

Denial of Masiz's Objection

The district court's 8-27-20 denial of Masiz's Objection was issued during the evidentiary hearing in which Masiz was barred from participating and subsequently memorialized in its 8-28-20 Order.[54] The district court stated in its written order that "for the reasons stated in the excerpt of the August 27, 2020 hearing . . . it is *not appropriate* to assure Masiz that, whatever his conduct, the court will not inquire concerning whether he has violated the injunctions."[55] In the cited colloquoy between the court and Masiz, and in its written order, the district court referenced its *BioChemics'* decision as the "reason" it was "not appropriate" to assure Masiz that he would not be singled out for special treatment and therefore Masiz's Objection was denied.[56]

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53 121a; 124a-126a; *See also* proffered testimony: 143a (8-25-20 Affidavit of Receiver, par. 12-15 (ADEC claims that SEC lien on Inpellis assets was fraudulent); and,163a-165a (8-25-20 Affidavit of Trustee, par. 33 regarding BioStrategies' objection to the Trustee not undertaking an action to void the SEC lien).

54 4a; 17a.

55 4a-5a.

56 *Id.*

The district court made it clear at the 8-27-20 hearing, as it had previously done at the 7-10-20 Hearing, that the "reasons" it was appropriate to treat Masiz differently were detailed in its *BioChemics'* decision: "[t]o the extent that Mr. Masiz would be treated differently than other bidders, it's because he's in what [the court] hope[s] is a unique situation."[57] It is impossible to square the district court's position that it was appropriate to "treat[ ] [Masiz] differently than" others because of the court's belief that Masiz is in a "unique situation" with the court's ruling that evidence as to whether that belief is soundly rooted in facts, is "not relevant." Beliefs held by a judicial officer that the officer refuses to test against the facts, and which propel the officer to take coercive action in derogation of a citizen's fundamental rights, are no more than an *inappropriate* indulgence in prejudice. On September 16, 2020 Masiz filed a notice of appeal regarding the denial of his Objection to the 9-22-20 Sale.

1st Circuit's Denial of Appeals, Petition, and Stay Motion

The other decisions that are the subject of this Application are the 1st Circuit panel's denial of Masiz's two appeals, its petition, and the single judge stay motion. The denial regarding the two appeals and the stay motion was on the grounds that they were "moot."[58] It is difficult to address such a peremptory denial, premised as it is on an erroneous assertion *i.e.* the constitutional injury is in the past tense—that is so flatly and wholly contradicted by the record. The *BioChemics' decision* is

57 12a.

58 2a.

the basis for the district court's *continuing* investigation into Masiz's compliance with the 2017 disclosure requirement.[59] The imminent threat of irreparable harm to Masiz's free participation in the marketplace and the auction, likewise is due to the district court's stated intention, based on the *BioChemics'* decision, to expand the investigation to include Masiz's compliance with the 2004 and 2017 injunction against violation of the securities laws.[60] In such circumstances the 1st Circuit's belief that these matters are "moot" defies logical explanation.

V. SPECIFIC REASONS WHY A STAY IS JUSTIFIED

The standards by which a single Justice has authority to enter a stay pursuant to 28 U.S.C. § 2101(f) were summarized by Justice Scalia as follows:

> It is our settled practice to grant a stay only when three conditions are met: First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed.

Philip Morris USA, Inc. v. Scott, 561 U.S. 1301, 1302 (2010). In keeping with these standards, applications for a stay of judgment are granted when there is a clear-cut derogation of fundamental rights that is not freighted with "fact-bound contentions that may have no effect on other cases" and "refusing a stay may visit an irreversible harm" on the applicant but granting it "will apparently do no permanent injury to" respondents. *Id.* at 1302, 1305.

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59 216a-217a; 200a.

60 171a-172a; 176a-177a; 199a; 201a; 202a-203a; 204a-205a; 205a.

Here, the *BioChemics'* ruling that the federal court has "inherent authority" to investigate, on its own, suspected violations of SEC obtained consent decrees, in the absence of an allegation of non-compliance by the SEC—the Article II agency charged with the responsibility for enforcing the securities laws—is directly at odds with the foundational principles of our Constitution and Supreme Court precedent. *See*, **Section VA** below. It also, cannot be gainsaid that the injury to the Applicant in this matter, if the stay is not granted, will work a devastating and irreversible injury to his right to both freely participate in the marketplace in general and take part in the bidding process for the scheduled auction, in particular. *See*, **Section VB** below.

A review of the Constitutional principles and Supreme Court precedent laid waste by the *BioChemics'* decision should give rise to an overarching concern: the *BioChemics'* decision and its constitutionally noxious view of judicial power untethered to our republic's foundational principles is now circulating in the American legal blood stream—a circumstance that threatens the liberty and property of all of our citizens and compels remedial action by this Court.

A. Appeal Raises Fundamental Constitutional Issues Concerning Limits to Judicial Power & The Right of Citizens to Liberty

The bald assertion by the district court of coercive inquisitorial power against Masiz, is wielded like a cudgel against Masiz's free participation in the marketplace, in general and in the *BioChemics'* auction, in particular. This assertion of extra-judicial power coupled with the naked denial of even the rudiments of due process leading up to the courts' approval of the sale removes any doubt of the need for

protective action by this Court. The exercise of such extra-judicial power exceeds the clear Article III limits and constitutional bar against the court's usurpation of Article II authority recently re-affirmed by the Supreme Court as the fundamental precepts of our system of justice. The urgent relief requested is the only practical means available to ensure that such fundamental rights to liberty and property are preserved during the orderly course of these matters through the appellate process.

The Fifth Amendment enshrined into the Constitution the fundamental rights of a free people to life, liberty, and the pursuit of happiness declared a decade before by our founders. Constitution, 5th Amend. ("No person shall be deprived of life, liberty, or property, without due process of law"). Free citizens depend on an independent and constrained judiciary to ensure the promise of liberty is not compromised in practice without the lawful process that is due.

Any analysis of the exercise of judicial power must start with the fundamental recognition that "Federal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Insurance Co. of America*, 511 US 375, 377 (1994). Any exercise of the coercive authority of the federal court that does not come within this constitutionally mandated limit to its jurisdiction is extra-judicial, capable of inflicting substantial harm, and must be addressed.

1. Judicial Power Limited to Adjudicating Party Disputes

"Article III of the Constitution limits federal 'Judicial Power', that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *US Parole Comm. v. Geraghty*,

445 US 388, 395 (1980). The Supreme Court explained, this limitation restricts the role of the Judge to adjudicating disputes between parties in an adversarial context:

> Th[e] case-or-controversy limitation . . . limits the business of federal courts to *questions presented in an adversary context* and in a form historically viewed as capable of *resolution through the judicial process*, and it defines the *role assigned to the judiciary* in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

US Parole Comm. v. Geraghty, *supra* at 395-396 (emphasis added).

In short, Federal Courts are courts of limited jurisdiction restricted to adjudicating cases or controversies between parties without intrusion into the law making and law enforcing authority of the other two branches.

2. Judges Are Suppose to Be Adjudicators—Not Inquisitors

In *US v. Sineng-Smith*, 140 S. Ct. 1575 (May 7, 2020) the Supreme Court recently re-affirmed that under our system Judicial power is limited to adjudicating disputes between parties where the courts "wait for cases to come to them" and "decide only questions presented by the parties" ("Party Presentation Principle")—Judges are adjudicators, <u>*not*</u> inquisitors who "sally forth each day looking for wrongs to right":

> In our adversarial system of adjudication, we follow the principle of party presentation. . . . [I]n both civil and criminal cases, in the first instance and on appeal . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.
>
> [. . .]
>
> Courts are essentially passive instruments of government. . . . *They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties*.

US v. Sineng-Smith, *supra* at 1579 (emphasis added).

3. Constitution Prohibits Judicial Usurpation of Art. II Authority

This Court has throughout our history re-affirmed the fundamental wisdom of Montesquieu's concept that, to ensure the people's liberty, the governmental functions of law making; law enforcing; and the adjudication of disputes must be separate and distinct. Justice Thomas summarized this precedent going back to our founding principles:

> The Constitution creates three branches of Government and vests each branch with a different type of power. *See* Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1. "To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts." *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *see also Wayman v. Southard*, 10 Wheat. 1, 46, 6 L.Ed. 253 (1825) (Marshall, C.J.) ("[T]he legislature makes, the executive executes, and the judiciary construes the law"). By vesting each branch with an exclusive form of power, the Framers kept those powers separate. *See INS v. Chadha*, 462 U.S. 919, 946, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Each branch "exercise[s] ... the powers appropriate to its own department," and no branch can "encroach upon the powers confided to the others." *Kilbourn v. Thompson*, 103 U.S. 168, 191, 26 L.Ed. 377 (1881). This system prevents "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (J. Madison)—an accumulation that would pose an inherent "threat to liberty," *Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (Kennedy, J., concurring).

Patchak v. Zinke, 138 S. Ct. 897, 904-905 (2018).

This essential separation of Governmental power requires that each Branch *not* acquiesce in the usurpation of its power by any of the other Branches—a limiting principle of fundamental significance to our Constitutional framework in general,

and, in particular, to the exercise of judicial power.[61] *Young v. US ex rel. Vuitton Et Fils SA*, 481 US 787, 816-824 (1987) (Scalia, Concurring) ("The Judicial power is the power to decide . . . who should prevail in a case or controversy . . . [it] does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication . . . [This principle] is a carefully designed and critical element of our system of Government . . . since there is no liberty if the power of judging be not separated from the legislative and executive powers") (citing "1 Montesquieu, *Spirit of the Laws* 181, as quoted in The Federalist No. 78, p. 523 (J. Cooke ed. 1961)")

4. District Court Is Constitutionally Barred from Investigating Masiz's Compliance with Consent Judgments & Securities Laws

In accordance with the constitutional limitations on the federal court's power over cases or controversies and the prohibition against judicial usurpation of Article II authority, the federal court, irrespective of any suspicions it may have about Masiz's engaging in conduct outside the confines of the courtroom, does not have *any* "*inherent*" authority to police the SEC-obtained Consent Decrees or investigate *sua sponte* whether Masiz is in compliance with either the injunction against

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[61] *McCulloch v. State of Maryland*, 17 U.S. 316, 336 (1819) ("[I]f the powers derived from [the Constitution] are assignable by the Branches than "we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers").

violating the securities laws or the disclosure requirement of the 2017 Consent Decree obtained pursuant to 15 U.S.C. § 78u(d)(5).

The retained jurisdiction regarding the enforcement of the consent decree is limited to the judge's adjudicatory function to resolve disputes between the parties concerning compliance with the consent decree's terms. "*Kokkonen* . . . stands for the proposition that district courts enjoy no free-ranging ancillary jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Ricci v. Patrick*, 544 F.3d 8, 22 (1st Cir. 2008). The court can retain jurisdiction over the settlement with the consent of the parties only "by incorporating the terms of the settlement agreement in the order" and "in that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Kokkonen*, *supra* at 381. "[A] district court may possess inherent authority to address violations of an order where it retains jurisdiction in a separate provision but only when the order itself is violated." *Ricci v. Patrick*, *supra* at 22. It cannot reopen the decree and issue orders "absent a ["sustainable"] showing . . . that the terms of the . . . [decree] itself had been violated." *Ricci v. Patrick*, *supra* at 22. The judicial power under such retained jurisdiction is solely limited to the resolution of any disputes that may arise between the parties concerning a breach of settlement obligations. *See*, *F.A.C., Inc. v. Cooperativa De Seguros De Vida De Puerto Rico*, 449 F. 3d 185, 190 (1st Cir. 2006) (emphasis added) (Court ruled that an amended consent judgment satisfied the *Kokkonen* standards because: it "incorporate[d] the terms of the settlement and,

even more plainly, express[ed] by its very action in adjudicating a dispute about those terms an intention to *retain jurisdiction to resolve disputes about the settlement*").

Kokkonen and its progeny therefore make clear that any expression of the district court's judicial power pursuant to its retained jurisdiction to enforce the terms of the 2017 injunction was *solely* restricted to the adjudication of any disputes *between the parties* regarding Masiz's compliance. This is in keeping with the basic tenets of our constitutional system, the role "assigned the judiciary in [our] tripartite allocation of power," and the central role parties occupy in our adversary system.

5. District Court Has No Authority to Do What the SEC Is Barred from Doing Under 15 U.S.C. § 78u(d)(5)

In *Liu v. SEC*, 140 S. Ct. 1936 (2020), the Supreme Court recently affirmed that the authorizing statute at issue here, 15 U.S.C. § 78u(d)(5),[62] allows the SEC to "*seek*" from the federal court (not the court to seek in the first instance) *only* equitable remedies for the protection of investors—remedial powers that should *not* be "convert[ed]" "into an instrument for [ ] punishment" of the defendant:

> In interpreting statutes like § 78u(d)(5) that provide for equitable relief, this Court analyzes whether a particular remedy falls into those categories of relief that were typically available in equity.
>
> [. . .]
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> [E]quity courts . . . did circumscribe the award in multiple ways to *avoid transforming it into a penalty outside their equitable powers*."

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[62] 15 U.S.C. § 78u(d)(5) provides that "in any . . . *proceeding brought* . . . *by*" the SEC, the SEC "*may seek, and any Federal court may grant*, any equitable relief that may be appropriate or necessary for the benefit of investors" (emphasis added).

[. . .]

> Remedies should be fashioned so as not to "*convert[ ] a court of equity into an instrument for [ ] punishment* . . .

Liu v. SEC, *supra* at 1942, 1944, 1945 (emphasis added). *Liu* is a clear proscription against the SEC using its power to seek "equitable remedies" under the authorizing statute as a guise to impose punishing burdens on a defendant. In the face of that, it would be anomalous indeed, for the lower court to be allowed to usurp the SEC's authority so the court can engage in conduct the SEC cannot.

Under our system of justice, the SEC, as the Article II federal agency charged with enforcement of the securities laws and the party to the consent decree authorized by statute to seek certain "equitable remedies" for the redress of violations, is the proper party to assert an alleged breach by Masiz. In the absence of any such assertion by the party adverse to Masiz, the district court has no retained authority to police the settlement on its own volition, check out its own whims or suspicions, or institute its own investigation regarding compliance. In the absence of any case or controversy between the parties and in the face of the SEC's finding (resulting from a court ordered review) that Masiz was, in fact, in compliance, the court's claimed authority to investigate Masiz's compliance with not only the disclosure requirement, but with the securities laws in general, is devoid of even the pretense of constitutional authority. the court's naked expression of extra-judicial power in derogation of the constitutional restrictions to judicial authority compels the issuance of a protective stay while Masiz petitions the full court for the appropriate writs.

B. Granting the Stay Prevents a Gross Injustice to Fundamental Rights

Granting the stay is in accordance with the standards set out by the rules of appellate and civil procedure favoring preservation of the *status quo*. *See*, FRCP Rule 62(g) and FRAP Rule 8(a)(2)(A)(ii) (Both rules reserve to the appeals court the power to issue a stay "while an appeal is pending" "to preserve the status quo." Together, these rules ensure that an appellant's right to meaningful appellate review is preserved.

Once an applicant has made a "strong showing" of likelihood of success on the merits, the focus is on the equities of granting versus refusing a stay. *Philip Morris USA, Inc. v. Scott, supra* at 1305 ("A stay will not issue simply because the necessary conditions are satisfied . . . however the equities favor granting the application . . . [where] [r]efusing a stay may visit an irreversible harm on applicants but granting it will apparently do no permanent injury to respondents"); *See also*, *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (Upon a "strong showing" of the likelihood of success on the merits, the factors that should be taken into account when considering a stay pending appeal run decidedly to a weighing of the equities and consideration of the public interest: "whether the applicant will be irreparably injured absent a stay" versus whether issuance of the stay will substantially injure the other parties" and, "where the public interest lies").

Here there can be no doubt that if a stay is refused, Masiz will irretrievably lose his right to freely participate in the scheduled September 22, 2020 auction. In addition, if a stay is refused, Masiz will have to endure additional substantial injury to his

right to freely participate in the marketplace while he seeks relief from the full Court. Granting a stay merely results in a postponement of an event that can be re-scheduled. Postponement also has the salutary effect of preserving the opportunity not only for Masiz but any other interested bidder who wishes to participate in the sale.

Granting the stay and preserving the right to participate for all interested bidders, including Masiz, is also in keeping with the interest of the Receivership in maximizing the opportunity for competitive bidding. In recognition of the Receiver's fiduciary obligation regarding the efficient liquidation of the estate, the federal court by statute may approve a sale "if it finds that the best interests of the estate will be conserved thereby." 28 U.S.C. § 2004. In that vein, courts sensitive to those duties have supervised the sale of Receivership property ensuring that potential bidders "have been presented fully and fairly with notice of the assets for sale . . . and opportunities to purchase them." *Fleet National Bank v. H&D Entertainment*, 926 F. Supp. 226, 245-246 and fn. 70 (USDC DMa 1996) (finding that the procedures followed by the Receiver ensured that there was no "collusion or a single potential bidder who determined not to participate in the process because of the nature of the parties already involved" and that "[h]ad any bidder been interested and troubled by what seemed like a limitation, he or she surely would have inquired and had his or her concerns allayed"). Unfortunately, the same cannot be said for the procedures employed in this matter. Here a bidder who wishes to participate on the same terms as any other, has been subjected to the lower court's assertion of coercive inquisitorial power that is unconstitutional as

well as threats that if he participates in the bidding process he will be singled out and subjected to an expanded scope of such power—threatened treatment that has deterred his participation.

Under such circumstances, a stay is compelled to both preserve fundamental rights and to promote the public interest in a full and fair sale process that is not tainted by unjustified discrimination and artificial constraints preventing a commercially reasonable sale in the estate's best interests.

CONCLUSION

For these reasons, Applicant respectfully requests the Single Justice preserve the status quo and meaningful appellate review by granting the stay requested so that Applicant may have a reasonable period of time to enable him to obtain a Writ of Prohibition or, in the alternative, a Writ of *Certiorari* from the Supreme Court.

Respectfully submitted,

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APPENDIX

OPINION AND ORDERS

RECONSIDERATION ORDER

OTHER DOCUMENTS